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No. 96-871

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

STATE OIL COMPANY,
Petitioner,

v.

BARKAT U. KHAN and KHAN & ASSOCIATES,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

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Pursuant to Rule 37 of the Rules of this Court, this brief is respectfully submitted, in support of the Petition, by *amicus curiae,* the Association of the Bar of the City of New York. The consent of the parties to the filing of this brief has been requested. Petitioner has given consent; respondents have not.

INTEREST OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

The Association of the Bar of the City of New York (the "Association") is an organization composed of nearly 21,000 lawyers. While most members of the Association practice in the tri-state New York Metropolitan area, there are members from almost every state and from over fifty foreign countries. The Association's Committee on Antitrust and Trade Regulation has participated in shaping antitrust and trade regulation policy for decades, and its members include practitioners who represent both plaintiffs and defendants, as well as academicians.

The Association has a particular interest in the issue presented in this case—the appropriate test for judging maximum resale price maintenance. It first began studying this issue eleven years ago, issuing a formal report. Based on that study, and the work that it has performed since, the Association is concerned that clarification is needed in this area of the law and believes that this brief will provide substantial assistance to the Court in performing its analysis.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The Association of the Bar of the City of New York (the "Association") is an organization composed of nearly 21,000 lawyers. While most members of the Association practice in the tri-state New York Metropolitan area, there are members from almost every state and from over fifty foreign countries. The Association's Committee on Antitrust and Trade Regulation has participated in shaping antitrust and trade regulation policy for decades, and its members include practitioners who represent both plaintiffs and defendants, as well as academicians.

The Association has a particular interest in the issue presented in this case—the appropriate test for judging maximum resale price maintenance. It first began studying this issue eleven years ago, issuing a formal report. Based on that study, and the work that it has performed since, the Association is concerned that clarification is needed in this area of the law and believes that this brief will provide substantial assistance to the Court in performing its analysis.

SUMMARY OF ARGUMENT

The *per se* rule against maximum resale price maintenance was announced in 1968 in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), at a time when *all* resale restraints were subject to *per se* illegality under *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967). The *Schwinn* decision was overruled in 1977 in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), but *Albrecht* remained the law.

In *Sylvania* the Court was not called upon to reexamine maximum resale price maintenance, but it recognized generally that "[p]er se rules of illegality are appropriate only when they relate to conduct that is manifestly anti-competitive," *id.* at 49-50, and that "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than—as in *Schwinn*—upon formalistic line drawing." *Id.* at 58-59. Maximum resale price maintenance should not be considered such "manifestly anticompetitive conduct," since it generally has the effect of lowering prices to consumers, and has greater potential to intensify interbrand competition than to diminish it. Although it does have the potential to inhibit non-price competition at the dealer level, such impact can be effectively weighed in a rule of reason inquiry to determine whether, on balance, a particular arrangement is procompetitive or anticompetitive. Such an approach would be preferable to the continued blanket imposition of *per se* illegality.

ARGUMENT

The Association began studying the phenomenon of maximum resale price maintenance eleven years ago, and believes that the results of its extended examination should prove valuable to the Court in conducting its analysis of the issues raised in this case. In 1986, the Association issued a report in which it endeavored to present a balanced evaluation of the existing standard. That report remains timely and informative today, and is reprinted as an appendix to this brief. The present discussion undertakes to pinpoint exactly what is and is not presented on this review, and to examine further the wisdom of the *per se* rule that currently is applied to maximum resale price maintenance.

PARAMETERS OF THE ISSUE ON APPEAL

At issue in this case is the appropriate treatment of a pricing concession provided by a supplier to a dealer on the condition that the dealer not charge its own customers more than an agreed maximum resale price. The broader issue presented is the appropriate treatment of all caps placed by suppliers on the resale prices of their dealers—so-called "maximum resale price maintenance."

Origins of the *Per Se* Rule. In 1911, in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), this Court held resale price maintenance to be *per se* illegal. In 1967, in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), the Court went further and indicated that *all* resale restraints should be treated as unlawful *per se*. A year later, with all resale restraints still being subject to *per se* illegality, the Court took what then amounted to a relatively small step by

specifically holding in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), that maximum resale price maintenance—by which a supplier and dealer agree that the dealer will not charge more than a specified resale price—should be included in the catalogue of *per se* unlawful resale restraints.

Abridgement of the *Per Se* Rule. In 1977, *Schwinn* was overruled in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). The Court held that "[p]er se rules of illegality are appropriate only when they relate to conduct that is manifestly anti-competitive," *id.* at 49-50, and that "departure from the rule of reason standard must be based upon demonstrable economic effect rather than—as in *Schwinn*—upon formalistic line drawing." *Id.* at 58-59. *Albrecht,* however, remained the law, as the Court in *Sylvania* was not called upon to reach the issue of maximum resale price maintenance.

In the years following *Albrecht,* a succession of courts invented a variety of approaches for sparing maximum resale price maintenance from the ax of *per se* illegality. In case after case the courts found that there was a lack of causation, agreement or injury, and few defendants were ever found liable for the offense of maximum resale price maintenance.[1] The

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[1] *Northwest Publications, Inc. v. Crumb*, 752 F.2d 473 (9th Cir. 1985) (no causation because short-term termination clauses would have prevented dealers from raising their prices in any event); *Jack Walters & Sons Corp. v. Morton Buildings, Inc.*, 737 F.2d 698 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984) (persuasion and policing during promotion not illegal; also, no antitrust injury); *Curry v. Steve's Franchise Co.*, 1985 WL 6277 (D. Mass. 1985) (not enough coercion to establish

most notable exception was *Caribe BMW, Inc. v. Bayerische Motoren Werke AG,* 19 F.3d 745 (1st Cir. 1994), where the First Circuit held that the plaintiff had adequately alleged injury by showing that it had lost profits as a result of a maximum resale pricing agreement that inhibited it from selling to potential customers who would have preferred better service at higher prices.[2]

Price Assistance Programs. At the same time, numerous cases were decided concerning so-called "price assistance programs," or "pass throughs" whereby a supplier offered discounted pricing to its dealer on the condition that the dealer pass that discount along to the dealer's own customers. Typically, the supplier in these cases wanted to enable its dealers to lower their own prices in order to capture greater sales volume, while preventing the dealers from simply "pocketing" the discount and continuing to charge their customers the same resale prices as before.

These programs had suffered a serious setback in 1972, in the middle of the *Schwinn* era, when a district court in Texas decided that it amounted to *per se* unlawful resale price maintenance for a supplier to provide a discount to a dealer on the condition that the dealer pass that discount along to its customers. *Pearl Brewing Co. v. Anheuser-Busch, Inc.,* 339

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agreement); *Martindell v. News Group Publications, Inc.*, 621 F. Supp. 672 (E.D.N.Y. 1985) (no coercion proved).

2 *See also Blanton v. Mobil Oil*, 721 F.2d 1207 (9th Cir. 1983), *cert. denied*, 105 S.Ct. 1874 (1985); *Arnott v. American Oil Co.*, 609 F.2d 873 (8th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980).

F.Supp. 945 (S.D. Tex. 1972). Relying largely on this Court's decisions in *Schwinn* and *Albrecht,* the court there held that "conditioning a price reduction on the acquiescence or cooperation of the recipient to reduce its price can only be viewed as imposing restrictions on the reseller's freedom of decision, and, as such, is an unlawful price fixing combination".[3] *Id.* at 955.

As soon as *Schwinn* was overruled and *Sylvania* announced that the rule of reason should be the standard for judging vertical restraints other than resale price maintenance, the *Pearl Brewing* principle was rejected in a series of court of appeals decisions in various circuits.[4] These cases held that there is no resale price maintenance when a supplier offers a discount to a dealer on the condition that the dealer pass that discount along to its customers, either dollar-for-dollar or together with additional discounts that the dealer itself provides.

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3 Interestingly, *Pearl Brewing* was instituted by a competitor, and today would likely be thrown out for lack of antitrust injury under *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990).

4 *See Lattice Semiconductor Corp. v. Interface Electronic Corp.*, 37 F.3d 1505 (9th Cir. 1994); *Jack Walters & Sons Corp. v. Morton Bldgs., Inc.*, 737 F.2d 698 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984); *Lewis Service Ctr., Inc. v. Mack Trucks, Inc.*, 714 F.2d 842 (8th Cir. 1983), *cert. denied*, 467 U.S. 1226 (1984); *AAA Liquors, Inc. v. Joseph E. Seagram and Sons, Inc.*, 705 F.2d 1203 (10th Cir. 1982), *cert. denied*, 461 U.S. 919 (1983); *Bryant Heating and Air Conditioning Corp., Inc. v. Carrier Corp.*, 597 F. Supp. 1045 (S.D. Fla. 1984).

The reasoning behind these decisions was that since there was no agreement on the preexisting price that the dealer charged prior to the discount, there should be no price fixing in requiring the dealer to lower that price by the amount of the discount.

In 1988 this Court decided *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988), clarifying the law further by holding that *per se* unlawful resale price maintenance is limited to instances in which a supplier and its dealer agree that the dealer will resell at a specific price or price level. Other agreements between suppliers and dealers regarding resale prices would be judged under the rule of reason, permitting the fact finder to evaluate all of the procompetitive and anticompetitive effects of the agreement. The *Sharp* decision thereby bolstered the line of "pass through" cases that had overruled *Pearl Brewing*, because there was no agreement in those cases on what the dealers' ultimate resale prices would be, and the lower courts continued to hold that price assistance programs were not *per se* unlawful.[5]

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[5] *See Lattice Semiconductor Corp. v. Interface Electronic Corp.*, 37 F.3d 1505 (9th Cir. 1994). Furthermore, subsequent to *Sharp*, courts have found that a number of other types of agreements between suppliers and dealers concerning the dealers' resale prices did *not* constitute *per se* unlawful resale price maintenance because they too did not include an agreement on a specific price or price level. For example, one case held that it is not *per se* unlawful for a supplier to require a dealer to charge "even dollar prices" (*i.e.*, one dollar or two dollars but not $1.50). *Great Clips, Inc. v. Levine*, 1991 WL 322975 (D.Minn. 1991) Another case held that it is not *per se* unlawful to require a dealer to charge the same price as a certain other dealer, whatever that price might be. *Ben Elfman & Son. Inc. v. Criterion Mills, Inc.*, 774 F.Supp. 683 (D.Mass. 1991).

Price Assistance Programs With Price Floors. More complicated was the situation in which a supplier offered a discount to a dealer on the condition that the dealer pass the discount along to its customers, *but not reduce its resale price below a minimum price floor set by the supplier.* Suppliers in these situations believed that if they provided discounts to their dealers in order to support reductions in resale prices down to the level being charged for competing brands (so-called "wholesale price support"), they should be permitted to prevent a dealer from using the additional margin to wage a price war against other dealers by lowering its resale prices even more. This practice was held to be *per se* unlawful resale price maintenance in *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972), a holding that was followed recently by the Federal Trade Commission in *American Cyanamid*, Agreement Containing Consent Order to Cease and Desist, File No. 9510106 (1997).

Significantly, the court in *Lehrman*, in an opinion written by Judge Wisdom, recognized that there is a major distinction between minimum and maximum resale price maintenance, observing that although a supplier has no right to condition wholesale price support upon adherence to a specified *minimum* price, "[t]he supplier has a legitimate interest in satisfying himself that . . . retailers of the supplier's own product are charging no *more* than the price they have represented as requiring wholesale price support." *Id.* at 40 (emphasis added). Thus, the *per se* rule against minimum resale price maintenance in the context of price assistance

programs should not govern the analysis of maximum resale price maintenance in the context of price assistance programs.

Price Assistance Programs With Price Ceilings. In 1990, in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990), this Court addressed a price assistance program that included *maximum* resale price maintenance, but because that case was brought by a competitor of the dealer who was subject to the price ceiling, it was decided on the ground that the plaintiff had suffered no antitrust injury. The Court explicitly declined to reach the issue of whether to retain the *per se* rule against maximum resale price maintenance, stating, "[w]e assume, *arguendo,* that *Albrecht* correctly held that vertical, maximum price fixing is subject to the *per se* rule." *Id.* at 335 n.5 (emphasis added).

Finally, the court below decided the present case. It held that the dealer, Khan, had no choice but to accept the discount and charge no more than the price specified by the supplier, State Oil, since Khan had agreed to rebate any excess profit above the agreed cap. Further, the court held that this arrangement amounted to maximum resale price maintenance, and therefore was *per se* unlawful under *Albrecht.*

Thus, the issue presented in this case is whether an agreement between a supplier and a dealer requiring the dealer to resell at no more than a specified maximum resale price should be subject to the same rule of *per se* illegality as minimum resale price maintenance. This is the same issue that was distinguished by Judge Wisdom in *Lehrman*, faced by the First Circuit in *Caribe BMW,* and avoided by the many courts that found ways around *Albrecht* over the years.

Importantly, the issue is not whether maximum resale price maintenance *ever* can be anticompetitive, but whether it is so consistently anticompetitive that it warrants blanket condemnation under the rule of *per se* illegality. As this Court repeatedly has explained, *per se* treatment should be reserved to practices "which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pac. Ry. Co. v. United States,* 356 U.S. 1, 5 (1958). *See also, Sylvania,* 433 U.S. at 49-50; *Northwest Wholesale Stationers, Inc. v. Pacific Stationary and Printing Co.,* 472 U.S. 284, 289 (1985); *Jefferson Parish Hospital District No.2 v. Hyde*, 466 U.S. 2, 15-16 (1984).

As explained below, maximum resale price maintenance is not such a pernicious practice.

WHY THE PER SE RULE SHOULD BE DISCONTINUED

For the reasons articulated in the Association's 1986 Report, the Association believed, and continues to believe, that the *per se* rule against maximum resale price maintenance should be overturned, and that maximum resale price maintenance should be judged under the rule of reason. Maximum resale price maintenance generally has the effect of lowering prices to consumers, and in general has greater potential to strengthen interbrand competition than to diminish it. For example, maximum resale price maintenance can be essential to the successful introduction of new products, where dealers may be tempted to take advantage of the situation by charging inflated prices. Further, although maximum resale price maintenance does have the potential to inhibit non-price

competition at the dealer level, such impact can be effectively weighed in a rule of reason inquiry to determine whether, on balance, a particular arrangement is procompetitive or anticompetitive with respect to interbrand competition.[6]

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6 In *Sylvania*, this Court held that "[i]nterbrand competition . . . is the primary concern of antitrust law." 433 U.S. at 52 n. 19.

As stated in the Association's 1986 Report:

"The rule against resale price maintenance agreements under Section 1 of the Sherman Antitrust Act[7] dates to 1911,[8] and repeatedly has been reaffirmed by the Supreme Court.[9] We do not seek to weigh the arguments for and against this rule generally, but note that the reasoning behind it seems inapplicable to maximum prices in particular.

"In the context of fixing *minimum* resale prices, the fear typically is that dealers will combine to obtain higher prices or price ranges, and rely upon manufacturers to enforce such pricing against recalcitrant dealers.[10] Similarly, the power to maintain prices at the retail level may promote collusion or parallel conduct on the part of competing manufacturers.[11] These risks, however, do not normally apply where the

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7 15 U.S.C. § 1.

8 Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

9 *E.g.,* Monsanto Co. v. Spray-Rite Service Corp., 104 S.Ct. 1464 (1984).

10 Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 Georgetown L.J. 1487 (1983).

11 *Compare* Nye, "Can Conduct Oriented Enforcement Inhibit Conscious Parallelism," 44 Antitrust L.J. 206 (1975).

agreement merely keeps resale prices *down*,[12] although other risks may arise.

"The principal risk of maximum resale price maintenance is that it may stifle the ability of dealers to compete on the basis of offering ancillary services for which they cannot charge separately. For example, if some dealers would choose to compete by offering innovative, specially-equipped showrooms, educational programs or personalized service, but are prevented from charging a high enough price to cover their added costs, this dimension of competition will not develop. Similarly, if some dealers would choose to serve outlying geographic areas if they could charge enough to recover their costs, this added element of competition also will fail to develop if dealers are forbidden from charging more than a set limit.

"The chief reasons advanced for adopting maximum resale price agreements have been to protect the image of the manufacturer against loss of reputation among consumers who resent 'scalping' by high price dealers,[13] or to forestall possible public sector intervention. Of course, if maximum prices deprive dealers of a sufficient margin to promote or service a

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12 *See* American Bar Ass'n Antitrust Section Monograph No. 2, Vertical Restrictions Limiting Intra-Brand Competition 29, 84-96 (1977).

13 *Compare* FTC, Guides Against Deceptive Pricing, Guide III at 4-5, 16 C.F.R. § 233.3; Baltimore Luggage Co. v. F.T.C., 296 F.2d 608 (4th Cir. 1961), *cert. denied*, 369 U.S. 860 (1962).

product adequately,[14] the manufacturer can be expected to lose customers. Thus, the marketplace itself is likely to assess and help deter such errors if they occur.

"Some individual dealers may lose business to competing dealers of the same or other brands under maximum resale price maintenance. This consequence may be good or bad or neither. If it is simply the result of the fact that competitor's prices remain lower than they otherwise would be, such loss of business is not the concern of the antitrust laws, which are directed to preservation of competition, not individual competitors.[15] On the other hand, if dealers lose business because they are prevented from initiating innovative sales techniques, or expanding the borders of competition, or finding special niches, this may become a concern of antitrust.

"In recommending that maximum resale price agreements no longer be characterized as illegal *per se*, we do not contemplate that they should become exempt from normal antitrust scrutiny under the 'rule of reason' or other *per se*

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14 Methods such as cooperative advertising, direct payment for service, or nonprice vertical restraints can be used in these connections. As stated by Prof. Milton Handler: "The central teaching of Sylvania is that the overall effect of a vertical restraint must be the enrichment of competition in the market as a whole." *Antitrust - 1978*, 78 Colum. L. Rev. 1370 (1978).

15 *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

rules.[16] Where these arrangements promote competition, or at least do not unreasonably restrain it, they should be upheld. If such arrangements are anticompetitive under specific circumstances, however, they should remain vulnerable. For example, if a large dealer demands that a manufacturer bar higher-priced dealers from reaching other areas or performing more service, this could indicate that an illegal boycott,[17] unreasonable restraint,[18] monopolization or attempt to monopolize[19] was involved.

* * *

"Since 1977 the Supreme Court has not hesitated to re-examine[20] or narrow[21] *per se* rules where their basis was no longer evident and where courts have paid them only lip-

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16 *See* Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1979).

17 *Compare* Oreck Corp. v. Whirlpool Corp., 579 F.2d 126 (2d Cir.) (en banc), *cert. denied*, 439 U.S. 946 (1978).

18 *Compare* United States v. Grinnell Corp., 384 U.S. 563 (1966).

19 *See, e.g.*, Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

20 Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1978).

21 *See* Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc., 441 U.S. 1 (1978).

service. The Court has looked to the purpose[22] of such rules rather than woodenly applying the text of prior articulations. The *per se* treatment of maximum resale price fixing agreements is a candidate for such re-examination."

These comments remain equally true today, and the Association respectfully urges the Court to reverse the decision below and instruct the lower courts henceforth to apply the rule of reason to maximum resale price maintenance.

CONCLUSION

WHEREFORE, the Association respectfully urges the Court to grant the petition and vacate the decision of the court below.

Respectfully submitted,

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22 *Compare* United States v. Classic, 313 U.S. 299, 317-18 (1941).

APPENDIX

ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK

Committee on Antitrust & Trade Regulation

REPORT ON MAXIMUM RESALE PRICE FIXING AS A *PER SE* VIOLATION

Summary

For some time the courts have treated *maximum* resale price fixing agreements,[1] like minimum[2] and price-range[3] agreements, as illegal *per se*. We recommend reconsideration of this rule.

Discussion

The rule against resale price maintenance agreements under Section 1 of the Sherman Antitrust Act[4] dates to 1911,[5]

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1 Albrecht v. Herald Co., 390 U.S. 145 (1968); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951).

2 California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

3 United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

4 15 U.S.C. § 1.

5 Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).

and repeatedly has been reaffirmed by the Supreme Court.[6] We do not seek to weigh the arguments for and against this rule generally, but note that the reasoning behind it seems inapplicable to maximum prices in particular.

In the context of fixing *minimum* resale prices, the fear typically is that dealers will combine to obtain higher prices or price ranges, and rely upon manufacturers to enforce such pricing against recalcitrant dealers.[7] Similarly, the power to maintain prices at the retail level may promote collusion or parallel conduct on the part of competing manufacturers.[8] These risks, however, do not normally apply where the agreement merely keeps resale prices *down*,[9] although other risks may arise.

The principal risk of maximum resale price maintenance is that it may stifle the ability of dealers to compete on the basis of offering ancillary services for which they cannot charge separately. For example, if some dealers would choose to

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6 *E.g.*, Monsanto Co. v. Spray-Rite Service Corp., 104 S. Ct. 1464 (1984).

7 Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 Georgetown L.J. 1487 (1983).

8 *Compare* Nye, "Can Conduct Oriented Enforcement Inhibit Conscious Parallelism," 44 Antitrust L.J. 206 (1975).

9 *See* American Bar Ass'n Antitrust Section Monograph No. 2, Vertical Restrictions Limiting Intra-Brand Competition 29, 84-96 (1977).

compete by offering innovative, specially-equipped showrooms, educational programs or personalized service, but are prevented from charging a high enough price to cover their added costs, this dimension of competition will not develop. Similarly, if some dealers would choose to serve outlying geographic areas if they could charge enough to recover their costs, this added element of competition also will fail to develop if dealers are forbidden from charging more than a set limit.

The chief reasons advanced for adopting maximum resale price agreements have been to protect the image of the manufacturer against loss of reputation among consumers who resent "scalping" by high price dealers,[10] or to forestall possible public sector intervention. Of course, if maximum prices deprive dealers of a sufficient margin to promote or service a product adequately,[11] the manufacturer can be expected to lose customers. Thus, the marketplace itself is likely to assess and help deter such errors if they occur.

Some individual dealers may lose business to competing dealers of the same or other brands under maximum resale price

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10 *Compare* FTC, Guides Against Deceptive Pricing, Guide III at 4-5, 16 C.F.R. § 233.3; Baltimore Luggage Co. v. FTC, 296 F.2d 608 (4th Cir. 1961), *cert. denied*, 369 U.S. 860 (1962).

11 Methods such as cooperative advertising, direct payment for service, or nonprice vertical restraints can be used in these connections. As stated by Prof. Milton Handler: "The central teaching of Sylvania is that the overall effect of a vertical restraint must be the enrichment of competition in the market as a whole." *Antitrust - 1978*, 78 Colum. L. Rev. 1370 (1978).

maintenance. This consequence may be good or bad or neither. If it is simply the result of the fact that competitors' prices remain lower than they otherwise would be, such loss of business is not the concern of the antitrust laws, which are directed to preservation of competition, not individual competitors.[12] On the other hand, if dealers lose business because they are prevented from initiating innovative sales techniques, or expanding the borders of competition, or finding special niches, this may become a concern of antitrust.

In recommending that maximum resale price agreements no longer be characterized as illegal *per se*, we do not contemplate that they should become exempt from normal antitrust scrutiny under the "rule of reason" or other *per se* rules.[13] Where these arrangements promote competition, or at least do not unreasonably restrain it, they should be upheld. If such arrangements are anticompetitive under specific circumstances, however, they should remain vulnerable. For example, if a large dealer demands that a manufacturer bar higher-priced dealers from reaching other areas or performing more service, this could indicate that an illegal boycott,[14]

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12 *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977).

13 *See* Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1978).

14 *Compare* Oreck Corp. v. Whirlpool Corp., 579 F.2d 126 (2d Cir.) (en banc), *cert. denied*, 439 U.S. 946 (1978).

unreasonable restraint,[15] monopolization or attempt to monopolize[16] was involved.

Perhaps the most revealing evidence of the irrationality of the present rule is the length to which courts have gone to avoid it. In recent years courts have been applying some fairly tortured analysis to remain within the *per se* standard, yet avoid imposing liability on suppliers who seek to maintain a cap on resale prices.

The Albrecht Doctrine in the Courts

To this day, some courts continue to apply the *per se* rule of *Albrecht*[17] unswervingly.[18] In a recent opinion by Judge

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15 *Compare* United States v. Grinnell Corp., 384 U.S. 563 (1966).

16 *See, e.g*, Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

17 Albrecht v. The Herald Co., 390 U.S. 145 (1968).

18 *See, e.g.*, Blanton v. Mobil Oil Corp., 721 F.2d 1207, 1211 (9th Cir. 1983), *cert. denied*, 105 S.Ct. 1874 (1985) (gasoline supplier coerced retailer into lowering retail price, held *per se* illegal); Arnott v. American Oil Co., 609 F.2d 873, 884-85 (8th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980) (same); Bartleys Town and Country Shops, Inc. v. Dillingham Corp., 530 F. Supp. 499, 505-6 (D. Hawaii 1982) (shopping center lease requiring retailers to maintain high sales volume, the effect of which was to require retailers to keep price low, held *per se* illegal); Crown Central Petroleum

(continued...)

Posner,[19] however, the Seventh Circuit questioned whether the holding of *Albrecht* survived the Supreme Court's decision in *Sylvania*.[20] Key figures within the Justice Department and the FTC also have questioned the continuing viability of the *per se* rule.

According to Judge Posner, "[n]ow that assigning exclusive territories to dealers is lawful if reasonable, a manufacturer-imposed price ceiling intended to limit the power that exclusive territories give dealers to raise prices regardless of what other dealers in the manufacturer's product are charging may also be lawful in some cases."[21] In support of this position the court cited Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions*, 78 Colum. L. Rev. 1, 16 n.59 (1978), and *Eastern Scientific Co. v. Wild Heerbrugg Instruments, Inc.*, 572 F.2d 883 (1st Cir. 1978), which held that as a result of *Sylvania*, *minimum* vertical price fixing was not *per se* illegal as a means of enforcing a system of exclusive

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18 (...continued)
Corp. v. Brice, 427 F. Supp. 638 (E.D. Va. 1977) (same facts as *Blanton*, *supra*, but motion for retrial granted as judgment was against the weight of the evidence).

19 Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698, 706-7 (7th Cir. 1984), *cert. denied*, 105 S.Ct. 432 (1984).

20 Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

21 737 F.2d at 706-07.

territories.[22] Regardless of whether *Eastern Scientific* would be followed on its facts, maximum vertical price fixing would seem to present virtually an *a fortiori* case, since it cannot increase costs to consumers.

Other courts have disagreed. In a footnote to *Yentsch v. Texaco, Inc.*,[23] for example, the court stated that "[w]e need not enter the debate over whether maximum resale price maintenance should be treated differently from minimum resale price maintenance, since both are presently considered illegal *per se*."[24] The court noted the Pitofsky article cited above, but pointed out that *Sylvania* contained a footnote of its own which confirmed that price restrictions remain *per se* unlawful.[25] Another court, faced with similar arguments, reprinted a section of another Seventh Circuit opinion delimiting "the role of the lower courts in relation to pronouncements from the Supreme

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22 *See also* Knutson v. Daily Review, Inc., 468 F. Supp. 226, 231-32 n.7 (N.D. Cal. 1979), *aff'd*, 664 F.2d 1120 (9th Cir. 1981) ("recent case law has called into question the continued application of *per se* analysis to this type of case," citing *Continental T.V.* and *Eastern Scientific*).

23 630 F.2d 46 (2d Cir. 1980) (oil company acted to maintain resale price of gasoline, held *per se* illegal).

24 *Id.* at 51 n.3.

25 *Id.*; *accord*, Suburban Beverages, Inc. v. Pabst Brewing Co., 462 F. Supp. 1301, 1306 (E.D. Wis. 1978) (same).

Court", and declined to follow Judge Posner's arguments, applying instead the *per se* rule.[26]

Although few courts seem prepared to bury the Supreme Court's holding in *Albrecht* outright, a number of courts have been willing to go to some lengths to restrict its availability. These courts have taken a variety of approaches.

A. Insufficient Coercion

Some courts have attempted to limit *Albrecht's* reach by strictly construing its requirement that the defendant must coercively maintain a maximum price.

In *Curry v. Steve's Franchise Co., Inc.*,[27] for example, verbal harassment to lower prices was followed by a representative of the franchisor actually coming to the plaintiff's store and physically changing the prices listed on the menu boards and on the cash register. Because the franchisor never actually threatened retaliation for failure to comply with the franchisor's prices, however, the court found insufficient coercion, and thus no liability.

In *Dunn v. Phoenix Newspapers, Inc.*,[28] a newspaper actively solicited subscribers—subscribers the distributors were obligated to serve—at its suggested retail price. It also contracted directly with other subscribers for payment of the suggested price directly to the newspaper, and this amount was then credited to the distributor's account. The court found that

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26 Shafer v. Bulk Petroleum Corp., 569 F. Supp. 621, 625 (E.D. Wis. 1983), *quoting* Vail v. Board of Education, 706 F.2d 1435 (7th Cir. 1983).

27 1985-2 Trade Cas. ¶ 66,877 (D. Mass. 1985).

28 735 F.2d 1184 (9th Cir. 1984).

because the plaintiff/distributor had not tried to ask the subscribers to pay an additional amount, there would be no liability.

Finally, in *Dart Industries, Inc. v. Plunkett Co.*,[29] the manufacturer ceased dealing with a retailer after "constantly" urging the retailer to lower its prices, specifically pressuring the retailer in one instance, and publishing a rebate list varying the rebate by the resale price. Nonetheless, the court found that the retailer "retained complete control over its pricing policies" and imposed no liability.[30]

B. Price Assistance Programs

Courts have also shown a willingness to interpret around *Albrecht's per se* rule in the case of price assistance programs. Under such programs a manufacturer gives a distributor a discount, provided that the discount is passed on to consumers. In a series of recent cases, price assistance programs consistently have been upheld against charges that

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29 704 F.2d 496 (10th Cir. 1983).

30 *Id.* at 498. *See also* Martindell v. News Group Publications, Inc., 621 F. Supp. 672, 678 (E.D.N.Y. 1985) (newspaper threatened its distributors with termination if they did not adhere to the suggested price, held not liable for maximum price fixing because the threats did not actually coerce compliance and because no distributors were terminated as a result of the threats).

they constitute maximum resale price fixing, despite the fact that price restrictions are plainly involved.[31]

Jack Walters, for example, justified a manufacturer-imposed price assistance program on the ground that the manufacturer had advertised the resale price to the public, and it had a right to ensure the effectiveness of its advertising. The court stated that as it was lawful for the manufacturer to advertise a retail price, "it should be lawful to take at least the minimum steps necessary to make that advertising beneficial."[32] The court further concluded that the defendant's efforts to maintain the advertised price—including "threatening the dealers with termination if they went above that price, offering if they did to sell directly to the public at the advertised price, and checking up on the dealers to see whether they were charging more,"[33] constituted "the minimum steps that [the

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31 *Jack Walters*, *supra*, 737 F.2d at 707-8; Lewis Service Center, Inc. v. Mack Trucks, Inc., 714 F.2d 842 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 2678 (1984) (in which the Government filed a significant *amicus* brief, arguing that Mack's program was pro-competitive); AAA Liquors, Inc. v. Jos. E. Seagram & Sons, Inc., 705 F.2d 1203 (10th Cir. 1982), *cert. denied*, 461 U.S. 919 (1983); Bryant Heating & Air Conditioning v. Carrier Corp., 597 F. Supp. 1045 (S.D. Fla. 1984). *But see* Pearl Brewing Co. v. Anheuser-Busch, Inc., 339 F. Supp. 945 (S.D. Tex. 1972).

32 737 F.2d at 708.

33 *Id.* at 706.

manufacturer] had to take if its advertised price was to have any value, and they are therefore lawful."[34]

C. Injury and Damages

Some courts have attempted to restrict *Albrecht's* availability by placing limits on who can file suits challenging maximum vertical price restrictions. For example, the court in *Jack Walters* argued, and alternatively held, that because maximum vertical price restraints are procompetitive when combined with a system of exclusive territories, the plaintiff had not suffered any antitrust injury, as required by *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[35] Accordingly, the plaintiff in *Jack Walters* was not permitted to challenge the defendant's conduct.[36] The court emphasized that the only possible result of the maximum price fixing would be that the plaintiff would be forced to compete with other dealers of similar products. It concluded that "Walters will not be heard to complain about having to meet lawful price competition, which antitrust law seeks to encourage, merely because the competition may have

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34 *Id.* at 708. *See also Martindell*, *supra*, 621 F. Supp. at 678 (withdrawal of dealer support programs held lawful where newspaper's advertisements of suggested retail price did not violate the antitrust laws, as "logic dictates that failure to furnish promotional support to endeavors which undermined that lawful advertising also did not violate the antitrust laws").

35 429 U.S. 477 (1977).

36 737 F.2d at 708-9.

been enabled by an antitrust violation."[37] The court suggested that maximum price fixing would only result in an antitrust injury if the price was fixed at a level below the plaintiff's costs.[38]

Another means by which courts have attempted to limit suits for maximum vertical price fixing is by limiting plaintiffs to nominal damages. In *Newberry v. Washington Post Co.*,[39] for example, a group of plaintiffs were awarded only nominal damages because they could not prove beyond "the sheerest speculation" that they would have raised prices had it not been for the defendant's coercion. In contrast, other plaintiffs who had actually raised their prices despite the threats were awarded full treble damages.[40]

In *Knutson v. Daily Review, Inc.*,[41] the Ninth Circuit took a different approach. It recognized "the nearly impossible burden of proving what each dealer would have done if he had

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37 *Id.* at 709.

38 *Id. See also Knutson, supra* (advocating but not adopting a similar position); The Consortium, Inc. v. Knoxville International Energy Exposition, 563 F. Supp. 56, 60 (E.D. Tenn. 1983) (distributor could only benefit from maximum price fixing agreement between his supplier and trademark licensor, and therefore was not injured and could not sue).

39 438 F. Supp. 470 (D.D.C. 1977).

40 *Id.* at 483.

41 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

been free to make his own pricing decision,"[42] and instead created a presumption that without the restraints, the dealers would have acted to maximize profits. That presumption could be rebutted with proof that the dealers would have kept their prices below the point of profit maximization nonetheless.

On remand, the defendant successfully rebutted the presumption.[43] The court found that the plaintiff distributors of the defendant's newspaper would not have raised their prices had there been no coercion because they knew that if they had done so, the newspaper would have terminated their dealerships and converted to an employee-distribution system. Therefore, according to the court, the distributors lost no profits as a result of the defendant's illegal price restraint, and only nominal damages could be awarded.[44]

Plaintiffs can, of course, still sue to have a maximum price fixing scheme enjoined. However, courts have been unwilling to enjoin a manufacturer from dropping its independent distributors in favor of an employee-distribution system, despite charges of maximum price fixing. In *Auburn News Co., Inc. v. Providence Journal Co.*,[45] and *Hardin v.*

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42 *Id.* at 812.

43 Knutson v. Daily Review, Inc., 468 F. Supp. 226, 240 (N.D. Cal. 1979), *aff'd*, 664 F.2d 1120 (9th Cir. 1981).

44 *Id. Accord*, Northwest Publications, Inc. v. Crumb, 752 F.2d 473 (9th Cir. 1985) (same).

45 659 F.2d 273 (1st Cir. 1981), *cert. denied*, 455 U.S. 921 (1982).

Houston Chronicle Publishing Co.,[46] for example, dealer motions for preliminary injunctions to stop newspapers from refusing to deal with them were denied on the ground that treble damages would be a sufficient remedy.

Conclusion

Since 1977 the Supreme Court has not hesitated to re-examine[47] or narrow[48] *per se* rules where their basis was no longer evident and where courts have paid them only lip-service. The Court has looked to the purpose[49] of such rules rather than woodenly applying the text of prior articulations. The *per se* treatment of maximum resale price fixing agreements is a candidate for such re-examination.

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46 426 F. Supp. 1114 (S.D. Tex. 1977), *aff'd*, 572 F.2d 1106 (5th Cir. 1978).

47 Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1978).

48 *See* Broadcast Music, Inc. v. CBS, 441 U.S. 1 (1978).

49 *Compare* United States v. Classic, 313 U.S. 299, 317-18 (1941).

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** Concurs in the result only.

*** Professor First has prepared the attached dissent, in which Judge Wittner, Professor Cavanaugh, and Messrs. Schiller, Shimer and Stoll join.

DISSENTING STATEMENT OF HARRY FIRST

I would not advocate a judicial change in the current rule which holds that all vertical agreements to fix resale prices, whether those prices are "maximum" or "minimum" prices, are *per se* illegal. I do agree that there may be some maximum resale price agreements which a fullblown inquiry might find to be reasonable. The wisdom of a "no trial" rule in this area, however, does not depend only on such cases; but must take account of the overall benefit such a rule has on pricing behavior and competition in general.

It is my view that there are benefits to maintaining the *per se* rule even for maximum resale price agreements. First, as the Supreme Court said in *Albrecht v. Herald Co.*, 390 U.S. 145, 152 (1968), and reaffirmed in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 347 (1982), "[c]ompetition, even in a single product, is not cast in a single mold." Competition involves price, quality, and service. I would prefer to trust the judgment of the distributor competing in the retail marketplace to determine the precise mix which consumers prefer. If the manufacturer is concerned about distributors exploiting the monopoly power which flows from assigned exclusive territories, the problem should be cured by looking at the extent of the territorial restraint rather than by permitting the imposition of an additional restraint. See *Albrecht*, 390 U.S. at 154.

Second, a major benefit from the *per se* rule for maximum resale price-fixing is the protection it gives to the general rule that all agreements on price are *per se* illegal. I am concerned that retreat from the rule in the area of maximum vertical price fixing, as attractive as that might be for a few isolated cases, will create problems in three areas:

1. **Distinguishing ceilings from floors:** Once this form of price fixing is placed in the rule of reason category, we will inevitably see more overt price-fixing agreements. Some will start out as legitimate price ceilings; but, after a while, sales consistently made at the ceiling look little different from sales made at the floor. This will increase the chances for the facilitation of horizontal price-fixing, as noted in the Majority report. Further, it will be in the interest of some manufacturers and retailers to disguise minimum price-fixing agreements as maximum price agreements. Perhaps not all these disguises will work, but we will inevitably find more of these agreements which will require sorting either by the enforcement agencies or the courts.

2. **Distinquishing price from non-price restraints:** There are certainly economic distinctions between maximum and minimum price-fixing, and the Majority report is careful to make this distinction clear. Nevertheless, one cannot ignore the fact that the competitive arguments made by manufacturers for maximum resale prices—the advance of interbrand competition—can similarly be made for minimum resale prices. As Justice White noted both in his concurrence in *Continental T.V., Inc. v. Sylvania*, 433 U.S. 36, 69-70 (1977), and in his opinion for the Court in *Albrecht*, see 390 U.S. at 151 n.7, there are plausible justifications for a manufacturer to

control intrabrand minimum resale prices as part of a competitive interbrand strategy, such behavior allegedly holding little risk to competition because the market stands ready to discipline the manufacturer that sets too high a price. Why not subject those claims to case-by-case analysis?

3. **Distinquishing maximum horizontal price-fixing from minimum horizontal price-fixing:** The attractiveness of deserting the *per se* rule for maximum price fixing is that it appears to keep prices down. Horizontal maximum price-fixing will be put forward on the same grounds. Admittedly, such an argument sounds implausible when coming from competitors, but those involved in the professions or in service industries might very well attempt to make such arguments. Should we then subject such cases to fullblown inquiry?

A response to each of the above concerns, and one advanced by the Majority report, is provided by the siren call of the rule of reason. One can say that the desertion of the *per se* rule merely subjects such agreements to a rule of reason inquiry, and does not make such agreements lawful. This offers little protection. It has always been difficult to prove agreements "unreasonable." It may be even more difficult today, given the current willingness to define markets broadly and to require a connection between the concerted practice and the ability to exercise market power.

The *per se* rule for price-fixing agreements has served our economy well. I would not desert it even to permit

maximum resale price-fixing. The courts maintain some ability to work around the prohibition on maximum price-fixing (by failing to find agreement, for example); as do manufacturers (by offering direct rebates to consumers, or imposing sales quotas). On balance, I do not think that the benefits of allowing a few more cases through will exceed the far more significant costs of cutting back at the core of our antitrust protections.